Supreme Court, U. S.
FILED
DEC 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-548

BALTIMORE GAS & ELECTRIC COMPANY, ET AL.,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND CONSOLIDATED NATIONAL INTERVENORS, INC.,
Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RICHARD E. AYRES
Attorney for Respondents
Mailing Address:
NATURAL RESOURCES
DEFENSE COUNCIL, INC.
917 Fifteenth Street, N.W.
Washington, D.C. 20005

RICHARD COTTON
Attorney for Respondents
Mailing Address:
NATURAL RESOURCES
DEFENSE COUNCIL, INC.
2345 Yale Street
Palo Alto, California 94306

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-548

BALTIMORE GAS & ELECTRIC COMPANY, ET AL.,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND CONSOLIDATED NATIONAL INTERVENORS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Petitioners' Appendix (App.) A-1) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the court below was correct when it held that the Nuclear Regulatory Commission had failed to amass a record adequate to support a rule purporting to elucidate the environmental effects of the radioactive waste products of nuclear electric generating stations.

2. Whether the court below identified inadequacies in the record adduced by the Nuclear Regulatory Commission in support of its proposed rule sufficient to require remanding to the Commission for further proceedings.

3. Whether the fact that the court below oversees the rulemaking of a number of federal agencies provides any independent reason for reviewing its decision that an administrative agency failed to support a rule with an adequate record.

STATUTES AND REGULATIONS INVOLVED

The regulation involved (10 C.F.R. § 51.20(e)), and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, are set forth in the Petitioners' Appendix at A-94 and A-90. Pertinent provisions of the National Environmental Policy Act, 42 U.S.C. § 4331, *et seq.*, and Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, are set forth in the Respondents' Appendix (Resp. App.) at A-7 and A-10.

STATEMENT OF THE CASE

The decision of the court below contained two holdings. First, the court held that the Nuclear Regulatory Commission ("Commission") had violated the National Environmental Policy Act ("NEPA")[1] when it issued a

[1] 42 U.S.C. § 4331, *et seq.*

license to operate the Vermont Yankee nuclear power plant without considering the environmental effects of the radioactive wastes it would produce. Second, the court held that in a separate, "generic" rulemaking proceeding to evaluate such effects, the Commission had failed to compile a record adequate to support its conclusions. Accordingly, applying long-established, traditional Administrative Procedure Act standards for judicial review of administrative actions, the Court of Appeals remanded to the Commission to "generate a record in which the factual issues are fully developed."[2] The petition involved here relates to this latter decision; the former is the subject of a separate petition responded to separately.[3] Because of the interrelationship between the two cases, we present the statement of facts for both in this brief.

High-level radioactive wastes are of concern because they consist of a number of highly toxic radioactive ele-

[2] The Court of Appeals' decision is the fourth in the past five years that has held that the Commission or its predecessor the Atomic Energy Commission has failed to comply with the requirements of NEPA with respect to major nuclear power reactor licensing issues. The others are as follows. *Calvert Cliffs Coordinating Comm.* v. *Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972), held that the Commission had violated NEPA by its footdragging and grudging implementation of the law. *Scientists' Institute for Public Information* v. *Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973), held that the Commission had violated the law by initiating a major program to develop the so-called "breeder reactor" without an evaluation of its environmental consequences. *Natural Resources Defense Council* v. *Nuclear Regulatory Commission*, 539 F.2d 824 (2d Cir. 1976), held that the Commission had illegally attempted to go forward with a major program to recycle spent fuel without evaluating its environmental consequences. In the *Calvert Cliffs* case, the court was moved to comment that the Commission's torpid reaction to NEPA mocked the intent of the Act. *Calvert Cliffs*, *supra*, at 1117-1122.

[3] *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc., et al.*, No. 76-419.

ments. Perhaps the most threatening of these (though by no means the only one) is plutonium, the most abundant and one of the most toxic of the long-term wastes produced by conventional nuclear power plants. It poses two kinds of threats. First, it has a half-life of approximately 25,000 years, and it is believed to be so toxic that inhalation of even a single particle of plutonium dust may result in lung cancer.[4] As a result, it is generally accepted that, because of its long half-life, plutonium must be isolated from the environment for at least 250,000 years before it becomes non-toxic.[5] Second, small quantities of the degree of purity which may be expected to be produced at facilities reprocessing spent fuel from commercial reactors can be fashioned into a crude atomic bomb, using relatively simple and well-known techniques.[6] Thus the reprocessing of nuclear wastes may pose previously unheard-of threats of terrorist activity. Despite the enormous and unprecedented risks posed by the wastes from nuclear reactors, no method for isolating them from the biosphere has yet been developed.[7]

---

[4] *See* Luschbauch & Langham, *A Dermal Lesion from Implanted Plutonium*, 86 ARCHIVES OF DERMATOLOGY 121-124 (October 1962).

[5] *See, e.g.*, Farney, "Ominous Problem: What To Do With Radioactive Waste," 5 *Smithsonian Magazine* 21 (April 1974), and National Council of the Churches of Christ in the U.S.A., *The Plutonium Economy: Study Material For The Proposed Policy Statement* (1975).

[6] *See, e.g.*, Mason Willrich & Theodore Taylor, NUCLEAR THEFT: RISKS AND SAFEGUARDS (1974).

[7] *See Pugwash Newsletter 11*, 23 (July and October 1973), where the Continuing Committee of the Pugwash Conference on Science and World Affairs, a body of renowned international scientists, adopted the following statement:

> *No general solution for the isolation of long-lived radioactive wastes from the biosphere, for the necessary many thousands of years, is yet in hand; that is, despite a wide variety of proposals, "experts" still disagree on whether any of them will suffice.* Disposal in deep salt beds is perhaps the most thoroughly investigated possibility, but the viability of this approach depends on the geological details of the particular salt deposit. New and larger research programmes should be initiated in search of a solution. *It is impossible to be complacent about expansion in the use of nuclear power without having a solution in hand.* [Emphasis added.]

A. The Administrative Proceedings

Because the Court of Appeals' decision is based on the particular facts and circumstances of the two administrative proceedings, it is important to describe them accurately.[8] The decision of the court below reviews both the adjudicatory proceeding licensing the operation of the Vermont Yankee nuclear power plant,[9] and the Commission's promulgation of a rule purporting to elucidate the environmental effects of wastes generally.[10]

1. *The Vermont Yankee Licensing Proceeding*

In May, 1971, respondent Natural Resources Defense Council ("NRDC") intervened in an operating license proceeding on the Vermont Yankee nuclear power plant, located at Vernon, Vermont, seeking to assure that no license would be granted until the Commission had prepared an Environmental Impact Statement in which the full environmental impact of the plant, including the risks associated with the production of nuclear wastes, had been balanced against the benefits expected to flow from its operation. The Commission refused to prepare any Environmental Impact Statement until July, 1971, when the Court of Appeals for the District of Columbia

---

[8] As a careful review of the record demonstrates, petitioners' "Statement of the Case" omits essential facts and mischaracterizes the nature and circumstances of the administrative proceedings.

[9] *In Re: Vermont Yankee Nuclear Power Corporation*, Dkt. No. 50-271, before the U.S. Atomic Energy Comm'n, Atomic Safety and Licensing Board.

[10] *In Re: Environmental Effects of the Nuclear Fuel Cycle*, Dkt. No. RM-50-3, before the U.S. Atomic Energy Comm'n. *See Notice of Proposed Rulemaking*, 37 Fed. Reg. 24191 (Nov. 15, 1972); *Notice of Final Rulemaking*, 39 Fed. Reg. 14188 (April 22, 1974).

held that the Commission's position violated NEPA. *Calvert Cliffs Coordinating Committee* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 942 (1972). Subsequent to this decision, the Commission did prepare and hold hearings on an Environmental Impact Statement for Vermont Yankee. However, the Commission continued to refuse to include in the Statement an evaluation of the risks to the environment flowing from nuclear wastes to be generated by the operation of the plant, or to take any evidence on them, despite the fact that at least one member of the three-man licensing board felt that the issue might alter his decision on whether to license the plant.[11] Pursuant to the Commission's rules of procedure, NRDC sought review of this decision in the Commission's own Atomic Safety & Licensing Appeals Board, which, speaking for the Commission, affirmed the Commission's policy. Thus in January, 1973, NRDC promptly petitioned the Court of Appeals for the District of Columbia for review of the Commission's decision.

2. *The Commission's Rulemaking Proceeding*

At approximately the time when NRDC appealed to the Commission's Licensing Appeals Board, the Commission announced a proposal to reverse its earlier policy.[12] Henceforth, it said, it would include an evaluation of the environmental risks associated with the uranium fuel

---

[11] Dr. David Hall, in rejecting NRDC's argument that the environmental dangers caused by nuclear wastes must be considered when deciding whether to license a nuclear power plant, responded by stating that,

> My problem is then that . . . , if that were the approach that this Board would have to take, I would have to say that I can't foresee all of this *so I couldn't license any reactor.* [Emphasis added.]

Joint Appendix below, 42-43.

[12] 37 Fed. Reg. 24191 (November 15, 1972).

cycle[13] in the environmental cost-benefit analysis performed for each plant pursuant to NEPA. Rather than conducting inquiries into this issue in each licensing proceeding, however, it would undertake a single "generic" rulemaking proceeding in Washington. In opening this proceeding the Commission issued a draft document entitled "Environmental Survey of the Nuclear Fuel Cycle" ("Environmental Survey") (November, 1972).[14]

There followed a hearing to consider the proposed rule, which began on the morning of February 1, 1973, and ended one and one-half days later on the following afternoon. During the hearing, presentations were made by the Commission's own regulatory staff, a representative of the Environmental Protection Agency, and twelve other participants, including the respondents. In addition, the Hearing Board incorporated by reference in the record of the proceeding the Commission's Environmental Survey.

During the hearing, each participant was permitted to make an oral presentation to the Hearing Board but at no time were any of the participants permitted to cross-examine or submit interrogatories to the regulatory staff on its Environmental Survey, the source of the facts used in preparing the Environmental Survey, the scientific or mathematical methodology used in deriving

---

[13] The term "uranium fuel cycle" refers to the entire process through which uranium goes in the production of electric energy, from the mining of uranium ore ("yellowcake") to the eventual perpetual storage ("disposal") of the spent fuel as radioactive wastes.

[14] The Survey devoted 2½ pages to a description of one potential means for dealing with the high level radioactive wastes resulting from the operation of nuclear power plants. While agreeing that the government would have the obligation to isolate these wastes from the environment and maintain control over them "in perpetuity" (Environmental Survey G-11), it admitted that the government had abandoned its only proposed means for accomplishing this.

the conclusions in the Environmental Survey, or the omission from the Environmental Survey of all alternatives to current Commission proposals for waste reprocessing and disposal. 38 Fed. Reg. 49 (January 3, 1973).

In support of the conclusions of the Environmental Survey, the Commission's staff offered only one witness, Dr. Frank K. Pittman, Director of the Commission's Division of Waste Management and Transportation, who read into the record a twenty page prepared statement. His statement was later incorporated (often verbatim) into the revised version of the Environmental Survey published subsequent to the hearings. Dr. Pittman described—in the words of the court below, in terms which "can only be described as vague, but glowing:"—the Commission's plan, since postponed indefinitely, to build a "retrievable surface storage facility" for "temporary" (100 year) storage of nuclear wastes, pending development of a scheme for more permanent storage to replace several the Commission had earlier abandoned because they proved unworkable. App. A-28.

At the conclusion of Dr. Pittman's statement, members of the Hearing Board asked four minor questions of clarification.[15] In addition, one member, noting Dr. Pittman's failure to "document the assumptions" behind his statement, requested further documentation. Subsequently the staff submitted a 56-page document, "Additional Information on Environmental Effects of the Uranium Fuel Cycle." [16] This document devoted less than two pages to waste disposal, and "merely correct[ed] four minor numerical and typographical errors or omissions in his testimony." App. A-29 to A-30, n. 48. By

[15] The full transcript of the questions and Dr. Pittman's answers consumed only seven pages of the transcript, Resp. App. A-1 to A-6.

[16] Petitioner Baltimore Gas & Electric apparently refers to this document, describing it as the staff's "Supplementary Comments." Pet. 6-7, n. 6.

contrast, attempts by respondents' expert witnesses merely to point out omissions in the Commission staff's presentation were met with stoney incomprehension and hostile cross-examination by the Hearing Board. App. 31-32, n. 50.

On the basis of this record, the Commission thereafter promulgated a one page table, styled "Table S-3," which purported to summarize all the environmental impact of the entire uranium fuel cycle, App. A-95, and issued a final version of the Environmental Survey. In promulgating its new rule, the Commission took the position that, in all future licensing proceedings for nuclear power plants, Table S-3 was to be inserted into the Environmental Impact Statement, and that no further testimony or examination of the conclusions of Table S-3 was to be allowed.

In short, once forced to implement NEPA by court order, *Calvert Cliffs*, *supra*, the Commission at first attempted to avoid altogether its NEPA duty to weigh the potential for environmental harm from the highly toxic and radioactive waste products produced by nuclear reactors. When respondents sought to have this risk considered in the Vermont Yankee proceeding, the Commission refused even to accept evidence about it. Thus as the Vermont Yankee case reached the Court of Appeals, the Commission had never considered the potential environmental impact of the creation of radioactive waste at any time in that proceeding. Then, perhaps in response to the well-founded fear that a court might find this in violation of NEPA, the Commission commenced a truncated "generic" rulemaking proceeding to elucidate those potential impacts for consideration in future licensing proceedings. In the "generic" proceeding, it accepted at face value the undocumented and unexamined assertions of one of its own officials, then used this proceeding to foreclose any further public airing of the major ques-

tions surrounding the dangers of committing the nation to perpetual surveillance of these unprecedentedly dangerous nuclear waste products.

Upon the conclusion of the rulemaking proceeding, respondents once again petitioned the Court of Appeals. Owing to the close relationship between this case and the earlier one involving the Vermont Yankee licensing, the court consolidated and decided the two cases in one opinion. *NRDC, et al.*, v. *NRC*, —— F.2d —— (D.C. Cir. July 21, 1976), App. A-1.

B. The Court of Appeals' Decision

In deciding the two related cases, the Court of Appeals was called upon to determine whether the Commission had properly carried out its obligations under NEPA. As this Court has noted,[17] § 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), requires that in taking any "major federal action" such as licensing a nuclear reactor, the responsible federal agency must prepare an environmental impact statement to consider, *inter alia*,

> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> * * *
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

In the case of the Vermont Yankee proceeding, it was undisputed that the Commission had proceeded to issue a license to operate a nuclear electric generating facility on the basis of an Environmental Impact Statement that failed to include any consideration of the environmental impact of nuclear wastes. Thus, the question before the court in Vermont Yankee was a simple

[17] *Kleppe* v. *Sierra Club*, —— U.S. ——, 42 U.S.L.W. 5104 (June 28, 1976).

one: could the agency issue a valid license to operate a nuclear power plant without considering the environmental impact of the wastes it would produce? The court found it could not:

> The plain meaning of [the language quoted above] encompasses radioactive wastes generated by the operations of a nuclear power station, just as it does the stack gases produced by a coal-burning power plant.[18]

The court then turned to the Commission's legislative rulemaking, where the Commission purported to have determined the magnitude of this impact for purposes of future Environmental Impact Statements. Granting that the agency was free to proceed generically, the question was whether the conclusions of Table S-3 were grounded in the kind of record needed to assess accurately and completely the environmental impact of nuclear wastes as required by NEPA.

> NEPA requires the agencies to see to it that "the officials making the ultimate decision [are] informed of the full range of responsible opinion on the environmental effects in order to make an informed choice." [Citation omitted] The decision to proceed by rulemaking neither relieves the Commission of this obligation, nor permits it to depend solely on whatever contributions intervenors happen to make to develop a fair representation of scientific opinion for the record.[19]

Based on an examination of the record, a court must be able to conclude that an agency's decision rests on a full "consideration of relevant factors," [20] and that the

[18] App. A-6.

[19] App. 21.

[20] *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

agency has developed a factual record sufficient to support the judgments it makes about environmental impact. An agency's decision must be held arbitrary if it fails to respond convincingly to "apparently significant information . . . brought to its attention or substantial issues of policy or gaps in its reasoning raised." [21]

Looking to the rulemaking at issue, the court unanimously concluded that the record failed to show that the Commission had sought to inform itself fully about the environmental consequences of generating nuclear wastes. The Court examined at length the Hearing Board's virtually unquestioning acceptance of Dr. Pittman's vague and conclusory testimony, which glossed over the fact that no workable means had yet been conceived, let alone engineered, for assuring the isolation of nuclear wastes from the environment for the necessary aeons of time. It noted also the Commission's failure to respond to the issues raised by respondents, or to provide them with procedural devices for developing their position forcefully. It might also have pointed to the incongruity of attempting to determine, much less evaluate, differing positions on such an enormously complex and important question on the basis of a one and one-half day hearing.

Having failed to question the vague conclusory statements of the staff witnesses, to respond or even seriously to consider the apparently important questions of policy, fact, and reasoning presented by the respondents, the Commission could not, the court unanimously ruled, provide a reasoned statement of basis for its conclusion that the environmental impact of nuclear wastes would be minimal. Lacking that, its rulemaking was arbitrary and must be remanded in order to build an adequate record.

[21] App. 23.

REASONS FOR NOT GRANTING THE WRIT

The Court of Appeals' decision—in contrast to the straw man created by petitioners [22]—correctly applied long-established principles of judicial review of agency actions under the Administrative Procedure Act to the facts of this case. The court's decision raises no novel legal issues and is consistent with all decisions of this Court. Therefore, the Court of Appeals' decision presents no occasion for review by this Court.

The basic holdings of the Court of Appeals were two:

(1) The Court of Appeals held that, under NEPA, before the Commission may issue an operating license to a nuclear power reactor, the Commission must assess the environmental impacts associated with the reprocessing and disposal of radioactive wastes which are inevitably produced by the operation of a nuclear power reactor.

(2) The court held that the record which the Commission developed to evaluate the environmental impacts of radioactive waste disposal was grossly inadequate to support any assessment since the record consisted only of the unsupported, vague, and general assurance of one member of the Commission's staff that there were no cognizable environmental effects of radioactive waste disposal.

The court's remand required the Commission to generate an adequate record on the environmental impacts involved. The court noted that additional procedural devices might have to be used *if necessary to produce the required adequate record* and discussed several procedures which might be employed. But the Court em-

[22] As we demonstrate *infra*, petitioners' contentions are based on misstatements and erroneous characterizations of the Court of Appeals' decision.

phasized that the measure of the remand was to be the adequacy of the record, not whether the Commission used a particular procedural format.

In respondents' judgment, these legal propositions are so unremarkable and represent such routine application of principles long established in decisions by this Court that review here is both unnecessary and unwarranted. The Solicitor General, after requesting an extra month to consider this case, arrived at this conclusion; he has not asked this Court to issue a writ in this case.[23]

I. The Procedural Challenges Raised By Petitioners Rest On A Misstatement Of The Holding Below, And Ignore The Substantive Basis For The Ruling Below.

Petitioners' major argument focuses on the Court of Appeals' discussion of alternative rulemaking procedures and attempts to fashion this discussion into the court's holding. Thus, petitioners assert

> [T]he court below held that the Commission could cure those deficiencies [in the rulemaking record] *only* through use of special adversarial procedures in excess of the rulemaking rights provided by the Atomic Energy Act and the Administrative Procedure Act (APA). [Emphasis in original.]

Pet. 9-10. *See also, Petition of Vermont Yankee* (No. 76-419), 13. This simply misstates the Court of Appeals' holding.

A review of the Court of Appeals' analysis will illuminate petitioners' effort to create an issue not raised by the decision below. The court began its review of the rulemaking by emphasizing that it was "not proper for

[23] As the result of understandable pressure from an agency sharply criticized by the court below, the government may file a friendly response to the utilities' present petitions. But the Solicitor General's independent judgment recognized that the legal issues involved in this case are not worthy of a writ from this Court.

a reviewing court to prescribe the procedural format" for agency proceedings and that agencies have "discretion to select procedures" they deem best. App. A-18.

The court's examination of the case then focused on the administrative record. Specifically, the Court of Appeals held it was obliged to "examine the record so that it [the court] may satisfy itself that the decision was based 'on a consideration of relevant factors,'" quoting and citing *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). App. A-22, n. 35. The court emphasized:

> An agency may abuse its discretion by proceeding to a decision which the record before it will not sustain in the sense that it raises fundamental questions for which the agency has adduced no reasoned answers.

App. A-23.

Having set out its basic legal and analytical framework —concern with the adequacy of the record—the court undertook an extended analysis of that record. App. A-23 to A-38. On the basis of its review of the record, the Court of Appeals concluded that "the Commission, in its final decision, failed to address major contentions that were raised" and that "when apparently substantial criticisms were brought to the Commission's attention, it simply ignored them, or brushed them aside without answer." App. A-38, A-39. "This type of agency action," the court held, "cannot pass muster as reasoned decisionmaking." App. A-39.

Indeed Judge Tamm's concurrence characterizes even more bluntly the sad state of the record:

> I further agree with the conclusion of the majority that it is impossible to determine from the record before us whether the Commission has fulfilled its statutory obligations under NEPA . . . or whether it has uncritically adopted as its own the undocumented conclusions of a single witness that the waste

> storage issue is a 'non-problem' with which the Commission need hardly concern itself at this time. Accordingly, the inadequacy of the record demands that we remand to the Commission in order to ensure that it has taken a hard look at the waste storage issue.

App. A-52.

Having found the record inadequate to support the Commission's action, the Court of Appeals discussed the procedures utilized by the Commission to produce the record and the effect these proceedings apparently had on the adequacy of the record. The court pointed out that the Commission's procedures had foreclosed participants in the rulemaking proceedings from assisting the Commission to fashion an adequate record, and had failed to produce a full "ventilation" of the uncertainties surrounding the potential environmental impacts of the reprocessing and disposal of radioactive wastes produced in nuclear power reactors. The court emphasized that the Commission was affirmatively required by NEPA fully to disclose potential environmental impacts and pointed out the practical utility of various procedural devices for meeting this burden. App. A-17 to A-23. The court set out a number of procedural devices that are available to the Commission in order to ensure that an adequate record is developed. App. A-40. Indeed, the court's opinion suggests that it may be necessary to use these procedural devices in order "to generate an adequate record" that would satisfy the Commission's NEPA full disclosure obligations.[24] But the court emphasized that it was not dictating procedural requirements:

[24] Respondents strongly believe that the generation of an adequate record on the potential environmental impact of reprocessing and disposal of radioactive wastes will require the Commission to use procedures such as those recommended by the Court of Appeals. Given the past history of the Commission and the controversial nature of the issues involved in the present case, respondents believe that the only tools available to the Commission to generate an adequate record involve procedures similar to those the Commission has adopted in its plutonium recycle hearings. *See* 41 Fed. Reg. 1133 (January 6, 1976).

> We do not presume to intrude on the agency's province by dictating to it which, if any, of these devices it must adopt to flesh out the record . . . . Whatever techniques the Commission adopts, before it promulgates a rule limiting further consideration of waste disposal and reprocessing issues, it must in one way or another generate a record in which the factual issues are fully developed.

App. A-41.

Since the administrative record could not sustain the administrative decision, the court vacated and remanded the rule, quoting *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973), and *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 96 S.Ct. 579, 582 (1976):

> If the decision of the agency "is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration."

App. A-44.

The petitioner chooses first to pull the Court of Appeals' procedural analysis out of the context in which it appears, and then to argue that the decision below creates a wide-ranging precedent that calls into issue the notice and comment procedures of the Administrative Procedure Act. In truth, however, the court has simply held that the administrative record does not support the Commission's conclusion. The Court of Appeals' explicitly stated the Commission's obligation was to "in one way or another *generate a record* in which the factual issues are fully developed." (Emphasis added.) This holding (and the obligation placed upon the Commission) simply represents a straightforward application of the principles

articulated in a long line of decisions of this Court including *Overton Park, Camp* v. *Pitts*, and *Transcontinental Gas Pipe Line, supra.*

Petitioners' claim that the decision erected a new "unknowable" standard seems to suggest that the Court of Appeals has required further procedures *for their own sake.* Such a reading of the opinion is a fanciful concoction. The Court of Appeals has demanded that the Commission generate an adequate record and has suggested that the creation of such a record may necessitate the use of certain additional procedural devices. But the adequacy of the record, not an "unknowable" procedural standard, will determine whether the Commission's actions are sustainable.

II. The Court of Appeals Identified the Deficiencies in The Administrative Record.

Petitioners also argue that the court below failed to identify deficiencies in the record that demanded remanding the Commission's rule. This assertion is also flatly incorrect. The Court of Appeals set out in painstaking detail the Commission's statements for which no support existed in the record. App. A-23 to A-38. The court canvassed the statements of the only staff witness to discuss the issue of waste disposal, carefully identifying assertion after assertion that either had no support in the record or raised questions without answering them.

The court noted that one member of the Commission's Hearing Board had acknowledged that the record in the present proceeding was woefully deficient in contrast to other Commission proceedings and normal Commission practice:

> [O]ne of the, I think, outstanding practices of the Staff has been in the past, at least as far as I can tell, to meticulously document the assumptions

> that are made in the discussions. I find that that has not been done here . . . .

App. A-29 to A-30, n. 48.

The petitioners apparently admit the soundness of the court's conclusion regarding the Commission's failure to compile a record adequate to support its basic conclusions. In an attempt to find some basis for review, however, the petition attempts an artificial segmentation of the rulemaking proceeding in order to question the decision with respect to one aspect of the fuel cycle—"reprocessing" of spent fuel. Pet. 15-16. This claim distorts both the issue reviewed and the applicable law.

First, as the court below correctly perceived, the process of handling and disposing of nuclear waste products is an integrated whole, which cannot artificially be separated into such components as "reprocessing" and "disposal." For example, the potential for terrorists to divert plutonium—a potential the court noted went unaddressed by the Commission, App. A-31 to A-32—exists at any stage of the waste handling process where relatively concentrated plutonium is involved. The Commission's own characterization of its proceeding as an examination of the "nuclear fuel cycle" is evidence enough that the Commission regards these steps in the handling of nuclear wastes as an integrated whole, rather than a series of disjointed segments.

More important, the law does not oblige the court to list every deficiency it finds in the record in order to remand the rule to the agency. Had the court chosen to segment the rulemaking record artificially into "reprocessing," "disposal," etc., it would have identified many of the same deficiencies with respect to "reprocessing" as it did with respect to the record as a whole. Such an exercise would have been pointless as well as repetitious, however. Having found the record as a whole grossly

inadequate to support the rule proposed, the court was under an obligation to remand. *Camp* v. *Pitts*, *supra*. To list every deficiency would have been a waste of time.

Even if petitioners were correct as to "reprocessing," it would be difficult to understand their concern. If they are worried about whether the record amassed on this issue is sufficient to withstand review after further agency consideration, they are free to supplement the record on remand. If not, then they are free to concentrate on making sure that the Commission remedies the defects observed by the court, secure in the knowledge that the Commission's revised rule will "pass muster" in any subsequent judicial review.

III. The Special Position of the Court of Appeals for the District Of Columbia Circuit in Reviewing Administrative Actions Is Irrelevant To This Court's Decision Whether to Grant the Writ.

Grasping at straws, the petitioners contend that the fact that the Court of Appeals for the District of Columbia reviews the decisions of a number of federal agencies provides some independent basis for granting a Writ of Certiorari in this case. In truth, this is nothing more than an attempt to bootstrap on their earlier mischaracterization of the court's decision as one mandating the Commission to adopt specific procedures. As we noted previously, the legal principle applied in the Court of Appeals' decision is the far more pedestrian one of Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, requiring an administrative action to be supported by an adequate record.

What is clear, though perhaps vexatious to the petitioners, is that the court's decision is based on the specific facts of this particular rulemaking, as revealed by the record of the proceeding. Thus the effects of the Court of Appeals' decision, though distasteful to the

petitioners, are limited to this rulemaking and this federal agency. No amount of twisting and turning the opinion will convert it into something else. The court's conclusions, tightly bound to this record, are unexceptionable.

CONCLUSION

For the reasons set out above and in Respondents' Brief in Opposition in No. 76-419, the Petition for a Writ of Certiorari filed in this case should be denied.

Respectfully submitted,

RICHARD E. AYRES
Mailing Address:
NATURAL RESOURCES
DEFENSE COUNCIL, INC.
917 Fifteenth Street, N.W.
Washington, D.C. 20005

RICHARD COTTON
Mailing Address:
NATURAL RESOURCES
DEFENSE COUNCIL, INC.
2345 Yale Street
Palo Alto, California 94306

Attorneys for Respondents
Natural Resources
Defense Council, Inc.
Consolidated National
Intervenors, Inc.